

STATE OF NORTH DAKOTA
PUBLIC SERVICE COMMISSION

**McLeod Telemanagement, Inc. vs.
U S WEST Communications, Inc.
Complaint**

Case No. PU-1452-96-70

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

November 6, 1996

Appearances

**Commissioners: Bruce Hagen, Leo M. Reinbold and Allen Hoberg,
Substitute Commissioner.**

**David R. Conn, Counsel and William A. Haas, Counsel, Town Center, Suite
500, 221 Third Avenue SE, Cedar Rapids, Iowa 52401, appearing for McLeod
Telemanagement, Inc.**

**William P. Heaston, Counsel, 1801 California Street, Suite 5100, Denver,
Colorado 80202 and Daniel S. Kuntz, Counsel, P. O. Box 1695, Bismarck, North
Dakota 58502-1695, appearing for U S WEST Communications.**

**Charles E. Johnson, Commission Counsel, Public Service Commission, State
Capitol, Bismarck, North Dakota 58505, appearing for the Public Service
Commission.**

**Allen Hoberg, Office of Administrative Hearings, 918 E Divide, Suite 315,
Bismarck, North Dakota 58505, as Procedural Hearing Officer.**

Preliminary Statement

On February 5, 1996, U S West Communications, Inc. (USWC) filed with the North Dakota Public Service Commission certain changes to the terms and conditions governing Centrex Plus service in North Dakota which would effectively prohibit new customers from purchasing that service. The letter that USWC sent to customers notifying them of these changes stated a desire to "align prices for the introduction of competition", and a concern over "uneconomic arbitrage opportunities that U S WEST

Communications must address as the local telecommunications market is opened for competitive entry." (Exh. ____ (SCG-1), appended to Exh. 1). USWC also stated that a new offering would be available in six to nine months, with "similar feature functionality to our current Centrex Plus offering", but containing "additional enhancements." (Exh. ____ (SCG-1), appended to Exh. 1). It now appears that this time frame for the introduction of a replacement product will not be met. (Tr. 106-07).

On February 21, 1996, McLeod Telemanagement, Inc. (McLeod) filed a complaint alleging that USWC's action was discriminatory and in violation of law. USWC responded to that complaint on March 29, 1996, and filed a Motion to Dismiss McLeod's complaint on July 12, 1996, which will be considered by the Commission at the time the case is submitted for final decision. (Tr. 12).

Hearing was held in this matter on July 18, 1996. Commissioner Wefald has removed herself from the instant case because of the possibility of an indirect conflict of interest, and Allen Hoberg, Director of the Office of Administrative Hearings, is serving as Hearing Officer and substitute decision-maker in the case. At hearing, testimony was presented by witnesses for USWC and McLeod.

Analysis

In reaching a decision in this case, the Commission is mindful of the pro-competitive thrust of both state and federal law. The stated purposes of North Dakota law include a direction "to allow the development of competitive markets for telecommunications services where such competition does not unreasonably distract from the efficient provision of telecommunications services to the public," and "to establish and maintain reasonable charges for telecommunications services without unreasonable discrimination, or unfair or destructive competitive practices" (N.D.C.C. §§ 49-21-02(2) and (3)). The enactment of the federal Telecommunications Act of 1996 is also intended to bring competition to local telecommunications services. Thus, to the extent allowed by law, our decision should further the purposes of state and federal statutes designed to achieve competition in local telecommunications markets.

This case presents the Commission with two sets of questions that must be decided. The first is the question of the Commission's overall jurisdiction over this dispute. The second, is whether, assuming that the Commission has jurisdiction, USWC should be allowed to withdraw Centrex Plus service such that the service is not available to new customers. For the reasons stated in this order, the Commission finds that it has jurisdiction, and that the withdrawal of Centrex Plus service should not be allowed.

Centrex Plus generally is a nonessential service under North Dakota law. N.D.C.C. § 49-21-01(8)d. The transmission service component of Centrex Plus, however, is an "essential service" within the meaning of N.D.C.C. § 49-21-01(3)h.

Thus, the service in question has features of both essential and nonessential service. The Commission need not reach the question of the specific classification of Centrex Plus, however, because the provisions of N.D.C.C. § 49-21-07 allow the Commission to exercise jurisdiction regardless of whether the service is essential or nonessential. That section provides:

49-21-07. Discrimination unlawful. It shall be unlawful for any telecommunications company to make any unjust or unreasonable discrimination in prices, practices, or service for or in connection with like telecommunications service, or give any undue or unreasonable preference or advantage to any person or telecommunications company or to subject any person or telecommunications company to any undue or unreasonable prejudice or disadvantage in the service rendered by it to the public or to a telecommunications company . . .

Clearly, this section gives the Commission the power to act in situations such as the instant case. If the record shows that USWC acted to withdraw Centrex Plus service in order to prevent competitors like McLeod from using Centrex Plus as a means to compete in local exchange markets in North Dakota, then that withdrawal subjects McLeod (a "telecommunications company") to "unjust or unreasonable discrimination", and to "unreasonable prejudice or disadvantage in the service rendered to it" by USWC. Unjust discrimination or prejudice is unlawful under § 49-21-07, and within the power of the Commission to remedy.

Even if state statutes did not provide the Commission with the authority to act, however, the Commission has sufficient authority under the federal Telecommunications Act of 1996 to prohibit an incumbent local exchange carrier like USWC from withdrawing a service. While the FCC has elected not to adopt specific rules governing withdrawal of services by incumbent providers, it has determined that states should review such withdrawals to determine whether they are consistent with the Federal Act:

We are concerned that the incumbent LEC's ability to withdraw services may have anticompetitive effects where resellers are purchasing such services for resale in competition with the incumbent. We decline to issue general rules on this subject because we conclude that this is a matter best left to state commissions. . . . States must ensure that procedural mechanisms exist for processing complaints regarding incumbent LEC withdrawals of services.

In the Matter of Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, First Report and Order, FCC 96-325, CC Docket No. 96-98, slip op. ¶1968 (FCC August 8, 1996).

Thus, the duty of the Commission in this case is two-fold: We must be mindful both of the requirements of North Dakota law, and of the Telecommunications Act of 1996, and work to implement both. As will be discussed below, the record in this case demonstrates that the actions of USWC in attempting to withdraw Centrex Plus service will impede the development of competition in local exchange markets in North Dakota, result in unreasonable discrimination between customers and groups of customers, and unreasonably prejudice or disadvantage McLeod. Thus, USWC's action is contrary to both state and federal law; and the Commission has the authority to remedy those violations.

Having found that the Commission possesses jurisdiction over this matter, we turn to the factual questions before us. We find that there is little evidence to support USWC's assertion that Centrex Plus is an "obsolete" service. The material supplied by USWC and attached to the testimony of McLeod witness Gray evidences a product which continues to viable in the market. To the extent that USWC believes that additional enhancements are desirable or necessary, it is free to offer such enhancements either as options associated with Centrex Plus or in an entirely new service. Neither course precludes the continued availability of Centrex Plus for those who wish to purchase the service, however.

We also find that the evidence overwhelmingly supports the proposition that USWC withdrew Centrex Plus service because it did not wish to make the service available for resale in North Dakota. We are persuaded by the testimony of McLeod witness Gray, President of McLeod, Inc., that:

McLeod believes that [it] has no realistic alternative to Centrex Plus service to be able to bring competition to North Dakota in the near term. McLeod cannot provide facilities-based local service in North Dakota at this time. I do not believe the development of "wholesale" rates for other USWC retail services as required by the new federal law is underway in this state. And given our experience with USWC, we are not optimistic [that] any reasonable alternative will be available in the foreseeable future.

At this time, for McLeod in North Dakota, Centrex Plus service or its functional equivalent is essential to enter and compete in the local exchange market. McLeod has no realistic technically and/or economically feasible alternative to duplicate the features and functionality provided by Centrex Plus service. In fact, the dictates of the market may require that McLeod will continue to use Centrex Plus as its primary local service vehicle for the foreseeable future. Whether our members want facilities-based service or another form of resold service from McLeod will determine the extent to which such service can be successful in the marketplace.

(Exh. 1, pp. 5-6; see also Tr. 46-52). No wholesale rates have yet been agreed upon for North Dakota, and resale at retail rates is not feasible without the sort of volume-discounted service that Centrex Plus itself presents. Thus, the clear effect of USWC's action will be to delay McLeod's entry into local markets in North Dakota. This results in unreasonable prejudice and disadvantage to McLeod, in violation of North Dakota law.

In reaching this conclusion, we note that other regulatory agencies which have addressed this issue are in agreement. In March, the Oregon Public Utilities Commission rejected USWC's filing to grandfather Centrex Plus in that state, including in its decision a finding that the filing "is inconsistent with ongoing efforts to open Oregon's telecommunications markets to competition. U S WEST's proposal eliminates the opportunity for new resellers to purchase centrex-type products and limits the growth of its current competitors." In the Matter of Transmittal No. 96-007-PL, a Price List Filing relating to its Centrex Plus and Centraflex 2 service, submitted by U S WEST Communications, Inc. (UT 126), No. UT 126 / UM 790, Order No. 96-067, slip op. 2 (Oregon PUC March 7, 1996). More recently, the Iowa Utilities Board rejected the position of USWC, concluding that:

US West's catalog changes restrict the growth potential of its competitors and preclude others from competing just when competitive options are becoming available. Since no other resale options are currently available, the catalog changes control and stop the efforts to provide a choice in local telephone service. The effect is contrary to the development of competition in telecommunications markets and therefore, contrary to the legislative intent expressed in IOWA CODE § 476.95(2) (1995 Supp.)

McLeod Telemanagement, Inc. v. U S WEST Communications, Inc., Docket Nos. FCU-96-1 / FCU-96-3, slip op. at 8 (IUB June 14, 1996).

The South Dakota Public Utilities Commission also rejected USWC's request to grandfather its Centrex Plus service, and found:

[T]o permit US West to not allow new customers the advantage of this needed service in order to avoid the resale provisions of the Federal Telecommunications Act of 1996 would be detrimental to the public interest. If the Commission allowed US West to grandfather this needed service and not allow any new customers its benefits while at the same time allowing existing customers the benefits for an additional nine years, the Commission would have failed to protect the public interest. (Conclusion of Law VI, Case No. TC96-023, Order dated August 23, 1996.

To the extent that the "arbitrage" noted by USWC presents a problem, USWC should present relevant data and a proposed solution to this Commission. We noted, however, that a mere loss of market share (and revenue) does not in itself constitute

such a problem; indeed, that is merely a necessary part of the transition from a monopoly local exchange market to a competitive one.

Thus, we find that USWC's action unreasonably discriminates against, prejudices, and disadvantages McLeod, and is therefore in violation of law. We also find that USWC's action unreasonably discriminates among customer groups. First, USWC's action creates categories of "haves" and "have-nots" with respect to Centrex Plus service. Those in the first category are entitled to continue to receive Centrex Plus service; those in the latter may not purchase the service. Perhaps this discrimination would be acceptable if there were a functionally equivalent product meeting customers' needs that were simultaneously made available (as has been the case in other situations of Centrex "grandfathering"). The effect of "grandfathering" without such a replacement product, however, clearly places those in the "have-not" category in a less advantageous position than those currently purchasing Centrex Plus service; and it does so without any logical basis. This is unreasonably discriminatory. Second, USWC's proposal unreasonably discriminates in favor of customers who are large enough to purchase Centrex Plus service on their own, and against those customers who must "aggregate" usage to reach a sufficiently large size. It is unreasonable discrimination against the smaller end-users to prohibit them from aggregating traffic, through a reseller such as McLeod, so as to have available the same service options that are available to larger customers. The Commission's authority under N.D.C.C. 49-21-07 provides authority for the Commission to remedy discrimination such as this.

In conclusion, noting that North Dakota law favors the development of competition, we find that USWC's action unreasonably restricts McLeod's entry through resale into local exchange markets in North Dakota, and unreasonably discriminates against, prejudices, and disadvantages McLeod.

The Commission having reviewed the evidence of record and being fully informed in the matter makes the following:

Findings of Fact

1. On February 5, 1996, USWC made certain changes to the availability of its Centrex Plus service which effectively denied that service to new users in North Dakota.
2. McLeod has no economically and technically feasible means, other than the use of Centrex Plus service, to bring local exchange competition to North Dakota in the near term.
3. USWC's Centrex Plus product is not functionally obsolete, and there are no technical reasons requiring that the product be withdrawn.

4. The primary reason that USWC has attempted to withdraw Centrex Plus service is to deny the use of that service to new local exchange service providers who might wish to resell the service in competition with USWC.

5. USWC's action will impede the development of competition in local exchange markets in North Dakota, and will present a barrier to the entry of resellers into local exchange markets in North Dakota.

6. USWC's action unreasonably restricts McLeod's entry through resale into local exchange markets in North Dakota, and unreasonably discriminates against, prejudices, and disadvantages McLeod.

7. USWC's proposal unreasonably discriminates in favor of customers who are large enough to purchase Centrex Plus service on their own, and against those customers who must "aggregate" usage to reach a sufficiently large size. It is unreasonable discrimination against the smaller end-users to prohibit them from aggregating traffic, through a reseller such as McLeod, so as to have available the same service options that are available to larger customers.

From the foregoing Findings of Fact, the Commission makes its:

Conclusions of Law

1. USWC's action unreasonably discriminates against McLeod, and between different customer groups, and unreasonably disadvantages and prejudices McLeod, in violation of N.D.C.C. § 49-21-07.

2. USWC's action presents a barrier to entry into telecommunications markets, in violation of the Telecommunications Act of 1996, § 253.

From the foregoing Findings of Fact and Conclusions of Law, the Commission issues its:

Order

The Commission orders:

1. USWC's Motion to Dismiss is denied.

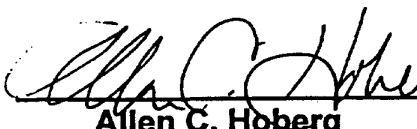
2. USWC shall continue to provide Centrex Plus service in North Dakota on the same basis as the service was provided prior to February 5, 1996, at least until such

time as the Commission approves the offering of a replacement product which is consistent with the requirements of law, as set forth in this order.

PUBLIC SERVICE COMMISSION



Bruce Hagen
Commissioner



Allen C. Hoberg
Substitute Commissioner



Leo M. Reinbold
Commissioner

STATE OF NORTH DAKOTA
PUBLIC SERVICE COMMISSION

**McLeod Telemanagement, Inc. vs.
U S WEST Communications
Complaint**

Case No. PU-1452-96-70

AFFIDAVIT OF SERVICE BY CERTIFIED MAIL

**STATE OF NORTH DAKOTA
COUNTY OF BURLEIGH**

Sharon Helbling deposes and says that:

she is over the age of 18 years and not a party to this action and, on the **8th day of November, 1996**, she deposited in the United States Mail, Bismarck, North Dakota, **12** envelopes with certified postage, return receipt requested, fully prepaid, securely sealed, each containing a photocopy of:

Findings of Fact, Conclusions of Law and Order

The envelopes were addressed as follows:

Mary Tribby
AT&T
1875 Lawrence Rm 1575
Denver CO 80202
Cert. No. P243 101 969

John Kapsner Atty for AT&T
P O Box 7009
Bismarck ND 58507-7009
Cert. No. P243 101 971

Joann Anderson
AT&T
901 Marquette Ave S 4th Fl
Minneapolis MN 55402
Cert. No. P243 101 973

William P Heaston
U S WEST
1801 California St Ste 5100
Denver CO 80202
Cert. No. P243 101 970

Karen Clauson
MCI Telecommunications
707 17th St Ste 3900
Denver CO 80202
Cert. No. P243 101 972

Dan Kuntz Atty for U S WEST
P O Box 1695
Bismarck ND 58502-1695
Cert. No. P243 101 974

Maria Arias-Chapleau
AT&T
1875 Lawrence Rm 1575
Denver CO 80202
Cert. No. P243 101 975

William E Flynn Atty for
McLeod Telemanagement Inc
4200 IDS Center 80 S 8th ST
Minneapolis MN 55402
Cert. No. P243 101 977

David R Conn Atty for
McLeod Telemanagement Inc
Town Center Ste 500
221 3rd Ave SE
Cedar Rapids IA 52401
Cert. No. P243 101 979

Lauren Stottler
U S WEST
P O Box 5508
Bismarck ND 58502-5508
Cert. No. P243 101 976

John Morrison Atty for
MCI Telecommunications
P O Box 2798
Bismarck ND 58502-2798
Cert. No. P243 101 978

William A Haas Atty for
McLeod Telemanagement Inc
Town Center Ste 500
221 3rd Ave SE
Cedar Rapids IA 52401
Cert. No. P243 101 980

Sharon Helbling further deposes and says that on the **8th day of November, 1996**, she deposited in the United States Mail, Bismarck, North Dakota, **one** envelope by regular mail, with postage fully prepaid, securely sealed, each containing a photocopy of the same to:

Greg Harwood
1 Capital Center Ste 911
999 Main St
Boise ID 83702

Each address shown is the respective addressee's last reasonably ascertainable post office address.

Subscribed and sworn to before me
this **8th day of November, 1996**.

SEAL

Notary Public

STATE OF NORTH DAKOTA

IN DISTRICT COURT

COUNTY OF BURLEIGH

SOUTH CENTRAL JUDICIAL DISTRICT

US WEST Communications, Inc.,	:	08-96-C-2536
	:	
Appellant,	:	
	:	
vs.	:	MEMORANDUM DECISION
	:	AND ORDER
North Dakota Public Service	:	
Commission and McLeod	:	
Telemanagement, Inc.,	:	
	:	
Appellees.	:	

Pending before this Court in this case are (1) Appellant's Motion to Stay, (2) PSC's Motion to Consolidate this case with 96-C-2706, and (3) an appeal from the PSC Order.

In deciding the motion to stay, the Court must determine whether it is likely US West Communications will prevail on its appeal. The subject matter of this appeal is not a matter routinely heard in court, and to determine the likely success by US West Communications takes about three-fourths of the time and effort required for decision on the appeal itself. Efficient use of time prompts a decision on the merits rather than wasting time on the motion. Thus the motion will be moot and any stay request must be raised on appeal.

Consolidation of the two cases would result in delay as

Burleigh 96-C-2536
Memorandum Decision and Order
January 24, 1997

this Court would have to wait for the other case to become ready for decision. Rule 42 ND Rules Civil Procedure provides for consideration of delay in consolidation. Because this case is ready for decision and the other is not, it is expedient to decide this one and deny the motion for consolidation. So ordered.

The appeal is based on eight issues as detailed on page 3 of Appellant's brief. Some of the issues involve matters of law and others are a challenge to the findings of fact. The standard of review is well known and this court is limited to an appellate function. Appellants tend to reargue the case as though this court was a fact finder rather than hearing on appeal.

The issues will be taken up in the same order as presented in appellant's brief.

Issue I - Psc Authority to Require a Telephone Company to Provide a Nonessential Service.

Centrex Plus is a nonessential service as per 49-21-01(8)(d). However, in its analysis the PSC noted that the transmission service component of Centrex Plus is an essential service within the terminology of 49-21-01(3)(h) and that the

Burleigh 96-C-2536
Memorandum Decision and Order
January 24, 1997

service in question on this appeal has features of both essential and nonessential service. This is a reasonable interpretation of the statutes and is sufficient to give the PSC jurisdiction of this controversy. Further, in 49-21-07, the legislature did not limit discriminatory practices to only essential services. To read it otherwise would add to the statute something that is not there. Giving effect to the entire chapter 49-21 and construing all of its statutes together leads to the legal conclusion that the PSC had statutory authority to determine whether the action of US West Communications was discriminatory.

Having so decided, it is not necessary to inquire into the authority of the PSC to act only under the authority of the Federal Telecommunications Act of 1996. Being a creature of statute and entitled to exercise of only such authority as the legislature gives it, action taken only under federal law are of dubious validity. That issue will be left for another time should it again arise. This issue again arises incidentally in regard to Issue 7.

Burleigh 96-C-2536
Memorandum Decision and Order
January 24, 1997

Issue 6. Conclusion of Unreasonable Discrimination in
Violation of 49-21-07 Not in Accordance with Law.

This is basically a rehash of Issue 1 and requires no further discussion. Appellant discussed this issue along with Issue 5 in which findings were attached and as Issue 6 was restated in the brief it was itself an attack on the findings.

Issues 2, 3, 4 and 5 and 6.

Apparently the Commission accepted the testimony offered by appellee McLeod through Witness Gray. This hearing was a two-witness hearing, one for appellant and one for appellee McLeod. Given such a black and white presentation there is little choice but to accept one side or the other. It is for the the PSC to weigh the evidence, decide what evidence is persuasive and to draw inferences therefrom. These findings are supported by a preponderance of the evidence as the record demonstrates. Appellant's arguments are merely a reargument of the facts and inference to be drawn therefrom. These arguments seek a different conclusion but do not demonstrate that a reasoning mind could not reasonably have reached the conclusions of the PSC.

Burleigh 96-C-2536
Memorandum Decision and Order
January 24, 1997

Issue 7

Without regard to whether the PSC was exercising a grant of authority from the federal act, the Commissioners clearly found "...US West Communication's action is contrary to both state and federal law...." (Last sentence, first paragraph, page 4, of Commission's Order.) Thus the PSC was relying on state law. Paragraph 968 of the FCC Interconnection order in the last sentence leaves it to the states to process complaints regarding LEC service withdrawals. This merely means that the PSC in deciding a discrimination case must look at federal law to determine what is allowed since that would preempt state law. If the actions of US West Communication were allowed by federal law the State could not interfere.

However, it does seem that in addition to acting under state law the PSC was searching for a grant of federal authority as in the first sentence of paragraph 4, page 3, it is stated, "Even if state statutes did not provide the Commissioners with the authority to act, the Commission has sufficient authority under the Federal Telecommunication Act...." In my opinion this is contrary

Burleigh 96-C-2536
Memorandum Decision and Order
January 24, 1997

to the PSC's status as a state agency possessing only such power as this state's legislature gave it. Any authority to act under federal law would have to come from the legislature.

However, since the Commission was clearly acting under state law, that is a sufficient basis for its decision.

This Court determines that the findings are supported by a preponderance of the evidence, that the conclusions of law and order are supported by the findings, and the order is in accordance with the law.

Decision ordered affirmed.

If Appellee desires a formal order of affirmance, they may present it for signature.

Dated this 24th day of January, 1997, at Mandan, North Dakota.

BY THE COURT:

/S WILLIAM F. HODNY
DISTRICT JUDGE

CC: Daniel J. Kuntz
Charles Johnson
William A. Haas
William E. Flynn

STATE OF NORTH DAKOTA

IN DISTRICT COURT

COUNTY OF BURLEIGH

SOUTH CENTRAL JUDICIAL DISTRICT

US WEST Communications, Inc.,

08-96-C-2536

Appellant,

-VS.-

North Dakota Public Service
Commission and McLeod Telemanagement, Inc.

**NOTICE OF ENTRY
OF JUDGMENT**

Appellees.

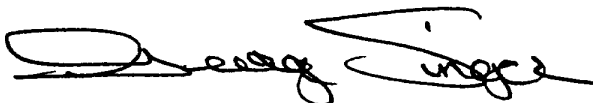
TO: Appellant, US WEST Communications, Inc., and its attorneys, Daniel J. Kuntz, Zuger Kirmis & Smith, 316 North Fifth Street, Provident Building, Bismarck, ND 58502-1695, and William P. Heaston, US WEST Communications, Inc., 1801 California Street, Suite 5100, Denver, CO 80202.

PLEASE TAKE NOTICE that the Court has entered judgment in favor of the appellees, North Dakota Public Service Commission and McLeod Telemanagement, Inc., and against the appellant, US WEST Communications, Inc., in the above-entitled case (1) affirming the decision and order of the North Dakota Public Service Commission; and (2) dismissing the appeal.

A copy of the Order and Judgment are attached.

Dated this 1st day of May, 1997.

LINDQUIST & VENNUM P.L.L.P.



George H. Singer
4200 IDS Center
80 South Eighth Street
Minneapolis, Minnesota 55401
(612) 371-2493

ATTORNEYS FOR MCLEOD TELEMAGEMENT, INC.

STATE OF NORTH DAKOTA
COUNTY OF BURLEIGH

IN DISTRICT COURT
SOUTH CENTRAL JUDICIAL DISTRICT

US WEST Communications, Inc.,

08-96-C-2536

Appellant,

-vs.-

**ORDER FOR ENTRY OF JUDGMENT
AND
JUDGMENT**

North Dakota Public Service
Commission and McLeod Telemanagement, Inc.

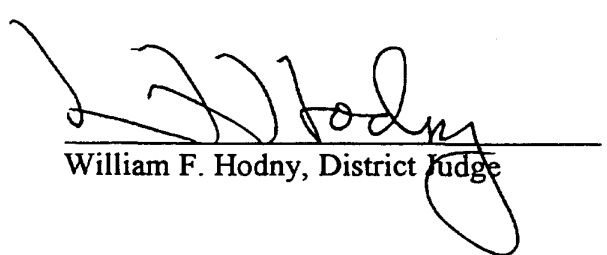
Appellees.

Dated this 29 day of April, 1997.

The matter before the Court arises in connection with a Memorandum Decision & Order entered by this Court on the 24th day of January, 1997, whereby this Court considered an appeal from a decision of the North Dakota Public Service Commission ("PSC"). Having heard the arguments of counsel and considered the entire record in the proceedings, IT IS HEREBY ORDERED:

1. That the findings and conclusions of the PSC are properly supported and in accordance with the law;
2. That the decision and order of the PSC is in all things AFFIRMED;
3. That judgment be entered in favor of the Appellees, North Dakota Public Service Commission and McLeod Telemanagement, Inc., and against US WEST Communications, Inc.; and
4. That the appeal of the above-entitled matter is in all things DISMISSED.

LET JUDGMENT BE ENTERED ACCORDINGLY.



William F. Hodny, District Judge

STATE OF NORTH DAKOTA

IN DISTRICT COURT

COUNTY OF BURLEIGH

SOUTH CENTRAL JUDICIAL DISTRICT

US WEST Communications, Inc.,

08-96-C-2536

Appellant,

-vs.-

North Dakota Public Service
Commission and McLeod Telemanagement, Inc.

**AFFIDAVIT OF
MAILING**

Appellees.

The undersigned, being duly sworn, deposes and says that I am a United States citizen, over 18 years of age, and on May 1, 1997, I served a copy of the attached Notice of Entry of Judgment and Order for Entry of Judgment and Judgment upon:

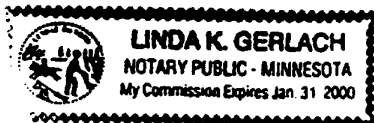
William P. Heaston, Esq.
U S West Communications, Inc.
1801 California Street, Suite 5100
Denver, CO 80202

Daniel S. Kuntz, Esq.
Zuger Kirmis & Smith
316 North Fifth Street
Bismarck, ND 58502-1695

by United States mail.

Cheryl McManners
Cheryl McManners

Subscribed and sworn to before me this 1st day of May, 1997, a Notary Public for the County of Scott, State of Minnesota. My Commission expires Jan. 31, 2000.



Linda K. Gerlach

LINDQUIST & VENNUM P.L.L.P.

4200 IDS CENTER
80 SOUTH EIGHTH STREET
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ATTORNEYS AT LAW

GEORGE H. SINGER, ESQUIRE
(612) 371-2493

ADMITTED IN MINNESOTA
NORTH DAKOTA & WISCONSIN

May 1, 1997

Clerk of District Court
Burleigh County
P.O. Box 1055
Bismarck, North Dakota 58502-1055

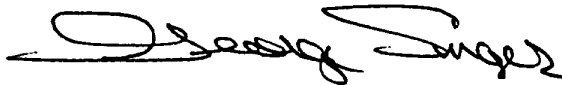
Re: US WEST Communications, Inc. vs. North Dakota Public Service Commission
and McLeod Telemanagement, Inc.--Case No. 08-96-C-2536

Dear Sir or Madam:

Enclosed for filing with the Court in the above-entitled case is a Notice of Entry of Judgment with attachments and an Affidavit of Service by Mail.

Very truly yours,

LINDQUIST & VENNUM P.L.L.P.



George H. Singer

Enclosures

cc: William P. Heaston
Daniel S. Kuntz
Charles Johnson

ORDER NO. 8.6 - 06

ENTERED
MAR 07 1996

BEFORE THE PUBLIC UTILITY COMMISSION
OF OREGON

UT 126
UM 790

In the Matter of Transmittal No. 96-007-PL,)
a Price List Filing relating to its Centrex Plus)
and Centraflex 2 service, submitted by U S)
WEST Communications, Inc. (UT 126))

ORDER

In the Matter of a Petition to Amend)
Commission Order No. 94-1055, filed by)
U S WEST Communications, Inc. (UM 790))

DISPOSITION: FILING REJECTED; PETITION DOCKETED

Introduction

On February 5, 1996, U S WEST Communications, Inc., (U S WEST) submitted Transmittal No. 96-007-PL, a price list filing related to its centrex-type services. In the filing, U S WEST proposes to: (1) prohibit new customers from subscribing to Centrex Plus and/or Centraflex System 2; (2) restrict the growth of existing Centrex Plus resellers to 20 new business locations per year during the duration of their term contracts; and (3) restrict the growth in the number of Centrex Plus station lines of existing customers during the duration of their term contracts. U S WEST's justification for the filing states, in its entirety:

Our evaluation of the environment and the marketplace has lead us to take this action. With the opening of competition in the local telephone market, U S WEST must align its service offering and prices for today's new competitive climate.

On February 12, 1996, the Commission Staff (Staff) submitted a report recommending that the Commission reject the price list filing for three primary reasons. First, Staff asserts that the filing violates the terms of Order No. 94-1055, in which the Commission approved a stipulation relating to the resale of Centrex Plus. In that stipulation, the parties—including U S WEST—agreed that resellers could purchase unlimited numbers of additional Centrex Plus lines. Second, Staff argues that the filing is in violation of OAR 860-32-020(2), Abandonment of Service, because it precludes services from being offered to new customers

ORDER NO. 96-067

the petition until it is properly served and the parties are allowed the opportunity to file a response pursuant to OAR 860-13-050(3)(a).

To clarify the scope of UM 790, the Commission notes that U S WEST makes two requests in the petition to amend. First, it asks the Commission to set aside or amend Order No. 94-1055 to the extent necessary to allow the company's February 5, 1996 price list filing. Second, apparently as an alternative request, it asks the Commission to find that the February 5, 1996 price list filing is consistent with the terms of the stipulation approved in Order No. 94-1055. As noted above, the Commission has rejected the price filing because it is inconsistent with the stipulation approved in Order No. 94-1055, thereby resolving the issue of consistency. Accordingly, the purpose of UM 790 is to investigate whether significant changes in the telecommunications market have occurred since the stipulation was adopted, as alleged by U S WEST in the petition to amend, that are sufficient to justify an amendment of Order No. 94-1055.

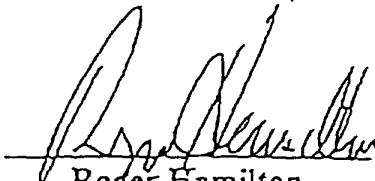
ORDER

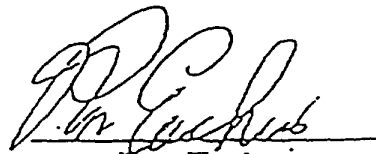
IT IS ORDERED that:

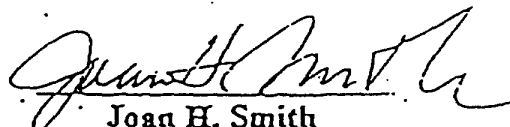
1. Transmittal No. 96-007-PL, filed by U S WEST Communications, Inc., is rejected pursuant to ORS 759.195(1).
2. The company shall continue to offer Centrex Plus and Centraflex System 2 service pursuant to prices, terms, and conditions currently set forth in existing price lists.
3. The petition to amend Order No. 94-1055, filed by U S WEST Communications, Inc., is docketed as UM 790.

Made, entered, and effective

MAR 07 1996


Roger Hamilton
Chairman


Ron Eachus
Commissioner


Joan H. Smith
Commissioner



BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF SOUTH DAKOTA

IN THE MATTER OF THE APPLICATION OF	)	ORDER DENYING REQUEST
U S WEST COMMUNICATIONS, INC. TO	)	TO DISCONTINUE CENTREX
DISCONTINUE ITS CENTREX PLUS SERVICES	)	PLUS SERVICE; FINAL
TO NEW CUSTOMERS	)	ORDER AND NOTICE OF
	)	ENTRY OF FINAL ORDER
)	
	)	TC96-023

On February 5, 1996, U S WEST Communications, Inc. (U S WEST) filed an application with the Public Utilities Commission (Commission) to discontinue its offering of Centrex Plus Services to new customers effective February 5, 1996. U S WEST proposed to continue its Centrex Plus Services to current customers until April 29, 2005, under the terms specified in their application or until the customer moved to another service. U S WEST further represented in its application that it intended to replace Centrex Plus with another product in six to nine months.

On February 8, 1996, the Commission electronically transmitted notice of the filing and the intervention deadline of February 23, 1996, to interested individuals and entities. Petitions to intervene were timely filed by MCI Telecommunications Corporation (MCI), McLeod Telemanagement, Inc. (McLeod), Bureau of Information and Telecommunications, Bureau of Administration, State of South Dakota (BOA), and AT&T Communications of the Midwest (AT&T). At its regularly scheduled meeting of March 6, 1996, the Commission granted intervention to the above petitioners and directed the Executive Director to set a procedural schedule.

On March 8, 1996, MCI filed a motion seeking reclassification of Centrex Plus Services as noncompetitive. On April 8, 1996, the Commission issued an order for and notice of hearing for May 8, 1996, to determine whether U S WEST's application to discontinue its Centrex Plus Services should be granted and whether MCI's petition to reclassify Centrex Plus should be granted.

Pursuant to its order for and notice of hearing issued on April 8, 1996, the Commission conducted a hearing on this matter on May 8, 1996. The hearing was held in Room 412 of the State Capitol, Pierre, South Dakota.

On July 16, 1996, at an ad hoc meeting, the Commission voted 2-1 to order U S WEST to reinstate Centrex Plus Service (Chairman Stofferahn, dissenting). After the Commission voted Dave Gerdes, an attorney representing MCI, withdrew MCI's motion to reclassify Centrex services.

After consideration of all the evidence received at the hearing and the oral and written arguments of counsel during and after the hearing, the Commission now makes the following Findings of Fact:

FINDING OF FACTS

I

U S WEST is a Colorado corporation providing local exchange telecommunications service, interexchange carrier access, intraLATA interexchange telecommunications services, and other telecommunications services throughout South Dakota.

II

On February 5, 1996, U S WEST filed an application with the Commission to discontinue its offering of Centrex Plus Service to new customers effective February 5, 1996. Exhibit 1. U S WEST

II

Since the loop portion of Centrex Plus is classified as noncompetitive and is therefore regulated and because Centrex Plus Service cannot be provided without the local loop, the Commission retains jurisdiction over the entire service for the purpose of determining whether Centrex Plus can be grandfathered as proposed by U S WEST.

III

In addition, the prohibitions against discrimination contained in SDCL § 49-31-11 apply to fully competitive services. The classification of a service as fully competitive does not relieve a company from the discrimination prohibitions found in SDCL § 49-31-11. A classification of a service as fully competitive does relieve a company from certain regulatory constraints such as rate of return or price regulation. See SDCL § 49-31-4. The reason why fully competitive services are still subject to the discrimination provisions of SDCL § 49-31-11 is easily understood given the definition of a fully competitive service. Pursuant to SDCL § 49-31-1.3, a service can be classified by the Commission as fully competitive if there are alternative services available to over 50% of the company's customers for that service or if the service is of such a limited scope or so discretionary in nature that regulation is not warranted. It is inconceivable that the Legislature intended to allow a company to discriminate in the provisioning of a service for which alternatives may not be available for up to 49% of that company's customers.

IV

U S WEST's attempt to withdraw Centrex Plus Service to new customers while continuing to provide Centrex Plus Service to existing customers is discrimination in the provisioning of telecommunications services as prohibited by SDCL § 49-31-11. The discrimination as proposed by U S WEST in its application concerning the provisioning of Centrex Plus Services is unfair and unreasonable.

V

Further, U S WEST's action of withdrawing Centrex Plus Service as to new customers, while continuing to provide Centrex Plus Service to customers of the service that existed prior to the February 5, 1996, withdrawal date, constitutes a violation by U S WEST of its obligation under 47 U.S.C. § 251(c)(4)(B) not to impose unreasonable or discriminatory conditions or limitations on the resale of telecommunications services. U S WEST failed to show that resale of Centrex Plus Service was "uneconomic arbitrage" since they introduced no cost evidence to support that statement.

VI

Finally, pursuant to SDCL § 49-31-7, the Commission has the authority and the jurisdiction to order U S WEST to reinstate or restore Centrex Plus Service as to all potential customers inasmuch as the same is necessary for the improvement of telecommunications services and the convenience of the public in South Dakota. As testified to by the largest user of Centrex Plus Service, the Bureau of Administration, Centrex Plus Service is not an obsolete service and it is a service that is currently meeting the needs of the state. To permit U S WEST to not allow new customers the advantage of this needed service in order to avoid the resale provisions of the Federal Telecommunications Act of 1996 would be detrimental to the public interest. If the Commission allowed U S WEST to grandfather this needed service and not allow any new customers its benefits while at the same time allowing existing customers the benefits for an additional nine years, the Commission would have failed to protect the public interest. The Commission finds that ordering the reinstatement of Centrex Plus Service and not allowing its discontinuance is necessary for the improvement of telecommunications services and is necessary for the convenience of the public.

VII

This decision by the Commission does not prevent U S WEST from attempting to replace its Centrex Plus Service in the future. As testified by U S WEST's witness at the hearing, a replacement service should be available in the very near future.

VIII

The Commission rejects the proposed Conclusions of Law submitted by the parties.

Based on the foregoing Findings of Fact and Conclusions of Law, it is therefore

ORDERED, that U S WEST shall reinstate its Centrex Plus Service.

PLEASE TAKE NOTICE that this final decision and order in Docket No. TC96-023 was duly entered on the 23rd day of August, 1996.

Pursuant to SDCL § 1-26-32, this order will take effect 10 days after the date of receipt or failure to accept delivery of the decision by the parties.

Dated at Pierre, South Dakota, this 23rd day of August, 1996.

CERTIFICATE OF SERVICE	
The undersigned hereby certifies that this document has been served today upon all parties of record in this docket, as listed on the docket service list, by facsimile or by first class mail, in properly addressed envelopes, with charges prepaid thereon.	
By	<u>H. L. K. K. K.</u>
Date	<u>8/23/96</u>
(OFFICIAL SEAL)	

BY ORDER OF THE COMMISSION:

KENNETH STOFFERAHN, Chairman
dissenting

James A. Burg
JAMES A. BURG, Commissioner

Laska Schoenfelder
LASKA SCHOENFELDER, Commissioner

DISSENT OF COMMISSIONER STOFFERAHN

The only certainty in the new telecommunication world is that confusion is both inherent and manufactured as we go through the process. A major key to our decision-making is separating the wheat from the chaff. There is plenty of chaff as telephone companies jockey for competitive position.

This docket is a good case study of separating the wheat from the chaff. It concerns but one service. We have the local exchange company battling would-be competitors. We have those invoking the new Telecommunications Act of 1996, and those citing our state statutes. We've heard about the public interest and we've heard about limits of our jurisdiction.

I see it this way. I wasn't a part of the classification docket, but I respect it. This Commission ordered Centron and Centron-like services be classified as fully competitive. Not everyone agreed, but that's what we did. Fully competitive must mean something or we wouldn't have the classification. What it means is that the company, in this case U S WEST, has market freedom in how they price and offer this service. Our Legislature intended this result, and we followed the rules.

U S WEST now wants to withdraw the service and we seem to be assuming fairly heavy-handed jurisdiction. Why? Doesn't our law mean anything? Are we obligated and entitled to set the law aside anytime someone complains? I don't think so. I've heard some assert that the local loop umbilical attached to Centrex gives us some right to assume jurisdiction. We know better than that. We knew better than that when we classified Centrex and the local loop portion of Centrex separately some years ago. Inclusion of the local loop was an administrative matter given the nature of Centrex. We never intended for this inclusion to now give us some sort of hidden jurisdiction. What about the other LECs? What about the sold exchanges? What about the discrimination statutes? Wouldn't the other LECs have an obligation to furnish the same kind of discounted service? Wouldn't the sold exchanges, under our order, be obligated to provide the same discounted service as U S WEST? This decision would fly in the face of discrimination statutes.

If I were a person of greater authority I could maybe be tempted to have U S WEST provide more services and do it for no charge. I could make my own laws and I could make everyone but U S WEST and their stockholders happy as I saw fit. But I'm not a person of greater authority. I am an elected Commissioner and it's my job to recognize the general statutory outline which defines my responsibilities. In this case it's very clear; we have declared Centrex is a fully competitive service, and given our declaration U S WEST is entitled to market the service as they see fit. If there is doubt whether Centrex is or is not fully competitive, that should be a topic for another day and a different docket.

STATE OF SOUTH DAKOTA	)	IN CIRCUIT COURT
	) SS	
COUNTY OF HUGHES	)	SIXTH JUDICIAL CIRCUIT
U S WEST COMMUNICATIONS, INC.	)	CIV. 96-330
)	
Appellant,	)	ORDER AFFIRMING DECISION,
	)	FINDINGS OF FACT AND
v.	)	CONCLUSIONS OF LAW AND
	)	ORDER OF SOUTH DAKOTA
PUBLIC UTILITIES COMMISSION	)	PUBLIC UTILITIES
OF SOUTH DAKOTA,	)	COMMISSION
)	
Appellee.)	

The above entitled matter having come on before the Court in the Hughes County Courthouse, Pierre, South Dakota on November 25, 1996, the Honorable Steven L. Zinter presiding; the appellant U S WEST Communications, Inc. being represented by Thomas J. Welk; the Appellee South Dakota Public Utilities Commission by Rolayne Wiest and Camron Hoseck, Special Assistant Attorneys General; and Intervenor AT&T Communications of the Midwest, Inc. by John S. Lovald; McLeod Telemanagement, Inc. by Warren W. May and David R. Conn; and MCI Telecommunications Corporation by David A. Gerdes.

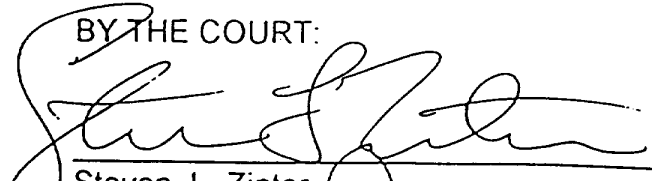
This matter involves an appeal from an administrative decision of the South Dakota Public Utilities Commission which entered its Decision, Findings of Fact, Conclusions of Law, Final Order and Notice of Entry of Final Order on August 22, 1996, this matter being docketed within the Public Utilities Commission as TC96-023.

The Court, having reviewed the record of the South Dakota Public Utilities Commission and having considered the briefs and arguments of the respective parties' counsel and based upon its bench decision, pursuant to SDCL 1-26-36 hereby

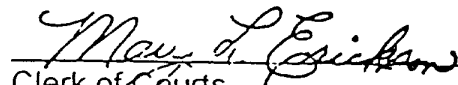
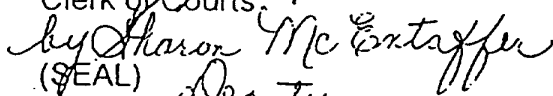
ORDERS that the Decision, Findings of Fact and Conclusions of Law and Order entered by the Public Utilities Commission in this matter, as described above, are hereby affirmed.

Dated this 2 day of December, 1996.

BY THE COURT:

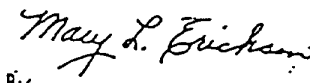

Steven L. Zinter
Circuit Court Judge

ATTEST:


Clerk of Courts.
by 
(SEAL) Deputy

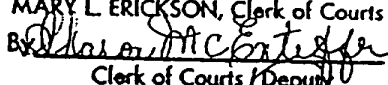
STATE OF SOUTH DAKOTA
CIRCUIT COURT, HUGHES CO.
FILED

DEC 02 1996

 CLERK
By _____ Deputy

State of South Dakota }
County of Hughes } ss

I hereby certify that the foregoing instrument is a true and correct copy of the original on file in my office.

Dated this 31 day of Dec. 1996.
MARY L. ERICKSON, Clerk of Courts
By 
Clerk of Courts / Deputy

COPY

STATE OF SOUTH DAKOTA)
COUNTY OF HUGHES) SS

IN CIRCUIT COURT
SIXTH JUDICIAL CIRCUIT

US WEST COMMUNICATIONS, INC.,
Appellant,
-vs-
PUBLIC UTILITIES COMMISSION
OF SOUTH DAKOTA,
Appellee.

CIV. NO. 96-330
TRANSCRIPT OF JUDGE
ZINTER'S BENCH DECISION

BEFORE: THE HONORABLE STEVEN L. ZINTER,
Circuit Court Judge of the Sixth
Judicial Circuit, Pierre, South
Dakota, on November 25, 1996.

APPEARANCES

THOMAS J. WELK, ESQ.
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& Greenfield, L.L.P.
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& Thompson
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ROLAYNE AILTS WIEST, ESQ.
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Pierre SD 57501-5070;

DAVID R. CONN, ESQ.
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Counsel for Appellee.
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May, Adam, Gerdes
& Thompson
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Pierre SD 57501-0160;
Counsel for MCI.

Counsel for AT&T.

1 THE COURT: Okay. Well, counsel, you've asked for an
2 expedited handling of this case and I'm going to do that
3 by attempting to give you a bench decision. I apologize
4 if it isn't as organized and coherent as it could be if it
5 was written, but I'll attempt to address the issues that I
6 perceive have been addressed in this case.

7 I think one of the problems in addressing the issue
8 is how you want to treat discrimination. And it has to
9 be -- under the state statutes at least it has to be
10 unjust or unreasonable discrimination and how you want to
11 treat that fact as it deals with the statutes that are
12 involved here. US West is arguing that because the
13 service is deregulated under Section 3.1 that the other
14 statutes which seek to regulate discriminatory aspects of
15 -- or discriminatory practices do not apply.

16 And I guess it -- whether you're looking at the
17 federal act or the state act, I agree with Mr. Welk, you
18 have to keep coming back to whether or not the state
19 statutes give the PUC jurisdiction to involve themselves
20 in this case when it is a fully deregulated service -- or
21 I should say a fully competitive service, which is
22 deregulated under Section 3.1. This really involves a
23 question of what does 3.1 mean and what do the other
24 statutes mean.

25 When this Court has reviewed the entire Chapter 49-31

1 in conjunction with the PUC's finding in Finding of Fact
2 14 that the application involved here was filed -- and I'm
3 quoting from that finding -- "in an attempt to avoid the
4 resale of Centrex Plus Services under the Federal
5 Telecommunications Act of 1996," I think that the entire
6 issue has to be framed in that context when that crucial
7 finding is involved. In other words, should 3.1 be read
8 in isolation or should it be read in the context of an
9 allegation that -- a factual allegation that the practice
10 involved is discriminatory in violation of the federal
11 act. And also the Commission finds later on that it's
12 discriminatory under the state act.

13 It's this Court's conclusion -- and I'll get to the
14 details of it as we go here, but ultimately, it's this
15 Court's conclusion that when Section 3.1 is read together
16 with Section 3, Section 7, and sections -- and Section 11
17 in particular, it's this Court's conclusion that 3.1 is
18 not the only statute which governs the Commission's
19 jurisdiction over a fully competitive service such as
20 Centrex Plus. Although Section 3.1 clearly prohibits the
21 Commission from exercising jurisdiction over such things
22 as rates of return and pricing, it appears to this Court
23 that when all the statutes are read together that Sections
24 3, 7, and 11 were not intended to be restricted to
25 services which are emerging competitive or non-competitive

1 only.

2 This Court believes that at least when the allegation
3 is made that the grandfathering is being proposed for
4 discriminatory purposes that number one, the local loop
5 argument as presented in Conclusion of Law Number 2 is
6 sustainable. While I agree with US West that the
7 Commission may not use a local competitive -- or a
8 non-competitive in this case, the local loop service, and
9 tie it to another service to extend its jurisdiction, I
10 don't believe that's what occurred here.

11 Under the facts that have been found, we're dealing
12 with -- and this is expressly included in Conclusion of
13 Law Number 2 -- the Commission concludes there that it has
14 jurisdiction and it limits itself by saying, "for the
15 purpose of determining whether Centrex Plus can be
16 grandfathered as proposed by US West." I would probably
17 wholeheartedly agree with US West and find there was no
18 jurisdiction under this local loop argument were it not
19 for the fact that the Commission limited that Conclusion
20 of Law by saying that it was making that conclusion solely
21 for the purposes of determining whether grandfathering as
22 proposed can be done.

23 That being the case, we then move into Sections 3, 7
24 and 11. And I think Section 3, obviously is not limited
25 to not -- expressly limited to non-competitive or emerging

1 competitive services. Section 3 gives the Commission
2 general jurisdiction or general supervision over all
3 telecommunications company practices to insure that -- or
4 to inquire, I should say, into unjust discrimination.

5 So also, Section 7 permits the Commission to order a
6 telecommunications company to change its business if
7 necessary to -- excuse me, if necessary, reasonable and
8 expedient to promote the convenience and accommodation of
9 the public.

10 And probably most importantly, Section 11 gives the
11 Commission jurisdiction to prohibit unjust or unreasonable
12 discrimination.

13 Notwithstanding US West's argument, none of these
14 three sections are restricted to non-competitive or
15 emerging competitive services. On the contrary, it's this
16 Court's conclusion that even though a service may be fully
17 competitive and therefore not subject to rate regulation
18 or pricing or rate of return analysis under Section 3.1,
19 nevertheless it still may be regulated under those three
20 sections. As a consequence, this Court concludes that the
21 Commission does have jurisdiction when the allegation is
22 as alleged in this case that the proposed action involves
23 unjust or unreasonable discrimination.

24 In that limited circumstance, it appears to this
25 Court that the Commission may invoke Sections 3, 7 and 11

1 to regulate, at least as far as they may regulate,
2 discriminatory practices of a telecommunications service
3 which is fully competitive.

4 The Court also as an alternative basis believes that
5 jurisdiction is bestowed on the Commission under the
6 federal acts, specifically 47 United States Code, Section
7 251(b) and (c), particularly (c)(4). That provision along
8 with the rules which have been promulgated by the FCC
9 indicate to this Court that the state commissions were
10 intended to act to prevent anticompetitive withdrawals of
11 service where resellers want to compete in that area.

12 Section (b) imposes on local exchange carriers not to
13 discriminate in resale; and Section (c)(4) and the rules,
14 particularly paragraph 968, in my opinion require the
15 state commissions to act to prevent anticompetitive
16 withdrawals of service. And I don't see any restriction
17 on emerging competitive or non-competitive services.

18 It appears to the Court that this federal act was
19 intended to have the Commission act notwithstanding the
20 nature of the service. The intent was to see and prevent
21 anticompetitive withdrawals of service. And that appears
22 to me to be what the Commission is doing in this case.

23 So having said that with respect to jurisdiction, we
24 then still have the question of whether or not there was
25 discrimination in this case -- and I should say whether it

1 was proven and whether the findings of the Commission are
2 sustainable. The Court views this as a question of fact
3 reviewable under the clearly erroneous standard. It may
4 be a mixed question of fact and law, and if it is, I
5 believe under Permenn that it would be of the type where
6 discretion should be afforded to the Commission especially
7 since this is an area which the Supreme Court has
8 recognized before is an area which this particular agency
9 is acting within its confines to exercise its discretion
10 and regulation in this area.

11 No matter what the standard of review, however, the
12 Court is of the conclusion and belief that the finding of
13 discrimination by the Commission is sustained by
14 substantial evidence in the record. The Court is not
15 going to go into all of the facts which may sustain it,
16 but I would state that I do note that I believe the
17 following factors are facts upon which such a finding is
18 sustainable.

19 Number one, there is a difference in the way existing
20 and future customers are being treated. Number two, the
21 state act, particularly the state statute, particularly
22 Section 11 prohibits unjust or unreasonable preference or
23 disadvantage. And it appears to the Court that the facts
24 in this docket clearly show that the resellers would be
25 disadvantaged in their quest to enter the local exchange

1 market through the Centrex Service.

2 In addition to those facts, I think the other
3 substantial evidence in the record that support this
4 discrimination finding are the fact that there are no --
5 and I quote "functional" -- I should emphasize functional
6 because I don't know that the Commission used that word,
7 but as I read the record, there really are no functional
8 equivalents of this service. I fully -- I think I fully
9 understand the arguments about PBX's and the other things
10 that US West argue are available, however, they're not
11 available for what the resellers are asking to do with
12 this service.

13 Now, US West has made an argument that that's not
14 permitted, that that use of this service is -- it's never
15 been done before and it's not contemplated and it
16 shouldn't be allowed. I don't really believe that's
17 relevant to the argument here. If in fact that's true, it
18 appears to the Court that US West needs to file a
19 complaint with the Commission or take up that issue on a
20 separate docket. But in this docket, the question is are
21 there functional equivalents available and the Commission
22 found otherwise. And I believe that is another reason why
23 -- or another -- it is other substantial evidence upon
24 which the discrimination finding can be sustained.

25 Other things in the record that I think are

1 substantial evidence to sustain a discrimination finding
2 include the fact that US West has proposed to grandfather
3 this service while indicating it's going to replace the
4 service with a new service yet it has not done so.

5 Another fact is the small end users who can't
6 aggregate by using the resellers are not going to be able
7 to get this service without it being provided through the
8 resellers. And I think most importantly, the Commission
9 made a finding based on its listening to the witnesses
10 that US West withdrew this service and filed its
11 application just a matter of days before the act was
12 signed by the President in an attempt to avoid the
13 competitive wholesale reselling requirements of the
14 federal act and to prevent further competition in the
15 local market.

16 Under those circumstances, it's this Court's belief
17 that the findings of discrimination are sustained by
18 substantial evidence and that the Commission has
19 jurisdiction to prevent discriminatory practices under the
20 state and federal statutes that I've previously dealt with
21 in this bench decision.

22 That concludes the decision of the Court. Counsel
23 for the Commission should submit an order affirming the
24 decision -- the Findings of Fact and Conclusions of Law of
25 the Decision dated August 22 -- 22nd or 23rd. I can't

1 read the copy that I have before me.

2 Any questions?

3 MR. WELK: Yes, your Honor. Is your decision that
4 you're informing -- you are affirming in total all the
5 findings and conclusions not modifying or reversing in any
6 manner the Commission's decision?

7 THE COURT: Well, I've attempted to give a recitation
8 of the issues that I believe are dispositive. Did I omit
9 something that you --

10 MR. WELK: I just didn't -- under 1-26-36, as the
11 Court is aware, you either modify, reject or accept. I'm
12 just asking are you intending to make additional
13 findings --

14 THE COURT: No.

15 MR. WELK: -- or affirming in total?

16 THE COURT: I'm going to affirm for the reasons
17 stated in my bench decision. So I don't believe findings
18 are necessary under 1-26-36.

19 MR. WELK: Okay.

20 MR. CONN: Your Honor, I would like to move that the
21 existing stay be vacated or is that something that would
22 be more properly part of your written order or --

23 THE COURT: Well, I think a matter of stay on appeal
24 is a different question governed by different statutes.
25 We would then be into 15-26A and the statutes governing

1 stays on appeal to the Supreme Court are different than
2 the statute that I granted the stay in the Administrative
3 Procedures Act. It's a different statute and there are
4 different requirements and different twists as I recall.

5 I don't -- I wouldn't be -- I wouldn't be willing to
6 entertain an oral motion on that. I will entertain, you
7 know, a motion on the stay issue. As far as I'm
8 concerned, the stay should -- will continue until -- well,
9 until the rules of 15-26A apply otherwise and if the Court
10 has some jurisdiction over that issue. But I think an
11 application would have to be made under 15-26A -- excuse
12 me, 15-6-26 -- 15-26 -- not 6 -- 15-26A, appeal of the
13 Supreme Court statutes. There are stay provisions in
14 there and I think they govern once I've entered a
15 decision.

16 Mr. Welk, do you have --

17 MR. WELK: I think you're right.

18 THE COURT: Okay. We'll be in recess.

19 (Conclusion of Judge Zinter's Bench Decision.)
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1 STATE OF SOUTH DAKOTA)

) SS

CERTIFICATE

2 COUNTY OF HUGHES)

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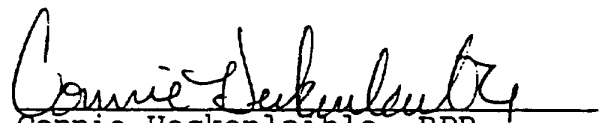
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I, Connie Heckenlaible, Official Court Reporter and Registered Professional Reporter in and for the State of South Dakota, do hereby certify that the Transcript of Judge Zinter's Bench Decision contained on the foregoing pages 1 through 11, inclusive, were reduced to stenographic writing and thereafter transcribed; that said proceedings commenced on November 25, 1996, in the Courtroom of the Hughes County Courthouse, Pierre, South Dakota, and that the foregoing is a full, true and complete transcript of my shorthand notes of the proceedings had at the time and place above set forth.

Dated this 26th day of November, 1996.


Connie Heckenlaible, RPR
Official Court Reporter